AMERICAN UNIVERSITY OF ARMENIA

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LL.M. Program

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TITLE

ADR practice in Armenia:

enforcement of arbitration awards and mediation settlement agreements

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NUMBER OF WORDS:

8655

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LIST OF ABBREVIATIONS

ADR	Alternative dispute resolution
Arbitration Act	RA Law on Commercial Arbitration
Mediation Act	RA Law on Mediation
Compulsory Execution Act	RA Law on Compulsory Execution of Judicial Act
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Member State	New York Convention Member State
Singapore Convention	UN Convention on International Settlement Agreements Resulting from Mediation

INTRODUCTION

This paper is aiming to discuss, find out and in some cases to be an opportunity for reforming the Armenian legislation and practice. It will highlight some issues encountered in practice and in regulation on national and international level. This research is based on Armenian legislation and practice, and also includes international practice, the practice of other countries, as well as legal and theoretical discussions about Alternative Dispute Resolution, especially Arbitration, Mediation and Enforcement of Arbitral Awards.

The main subject of this paper is the enforcement of international arbitral awards. Without crossing the lines of the main subject we will try to introduce some issues regarding alternative dispute resolution such as arbitration and mediation.

Alternative dispute resolution is a process aimed at resolving the disagreements arising between parties without recourse to courts. Generally dispute resolution is associated with the judicial remedies for settlement of the disputes at national courts. In the Republic of Armenia there is a lack of trust by the society towards any institution other than the judiciary. People rely on the hierarchy of the judiciary, the *courts* and want a binding decision, which would be enforced by the proper *State* body.

Dispute resolution with recourse to judicial system will usually require more time, cost more money and make the parties go through the appeal procedures, not always providing the parties with the result they aimed to get when initiating the proceedings in the end. The result of arbitration proceedings is not guaranteed as well; however, the parties will get a final award without going through several appeal procedures, they will save time and money. Another point worth mentioning is the expertise of the arbitrators: the parties to the dispute are free to choose arbitrators, who can be anyone above 25 years of age, with legal capacity, and are not required to have legal education, as opposed to judges[1]. In other words, judges usually do not have the required expertise when dealing with highly technical matters in different fields. Not having a requirement to have only legal education is an advantage as compared to judicial system where the judges most of the time do not have the necessary expertise in the area of the dispute. However, I do believe that some level of legal education is required as eventually arbitration is a legal process

[1] Article 11, Arbitration Act, 2006

at the end of which a binding for the parties award is made, which cannot be made without due consideration of legal principles and regulations.

Having the dispute settled by a professional of the field will facilitate the process of dispute settlement, and make it more efficient. For instance, in the Republic of Armenia the national courts are highly overloaded and the settlement of a simple case about a financial claim for recovery of an overdue loan can last up to a year and a half or even two years. After waiting such a long time and wasting money in expectation of justice, you bear the risk that you could get a decision you may consider unfair and unjust. The arbitral awards may be considered to be unjust and unfair for the losing party as well, and from this perspective the parties may value the opportunity of bringing appeals to higher courts more. Nevertheless, taking into account that the parties to dispute have more freedom of choice during the arbitral proceedings (choosing the arbitrators, the seat of arbitration, the applicable law, etc) and considering the costs, time scopes and the finality of an award, arbitration may prove to be a better alternative than the lengthy judicial proceedings.

In general there are several major incentives for advocating the use of ADR instead of judicial remedies as a means of dispute settlement. Firstly, ADR offers a quick resolution for disputes, which is especially valued in cases related to trade law and commercial matters which require quick resolution. Another reason is reducing the overwhelming amount of cases that courts deal with. One other important advantage of ADR is confidentiality. ADR keeps private disputes private, which is highly important in commercial matters. Lastly, as already mentioned above, ADR is more flexible as the parties to the dispute are free to choose arbitrators and mediators for their case.

Types of ADR

The ADR includes following dispute resolution means:

1. Arbitration
2. Mediation
3. Med-Arb
4. Mini trial
5. Summary jury trial

6. Negotiation.[2]

Of the above provided list RA legislation allows the usage of only arbitration, mediation, med-arb and negotiation. Mini trials and summary jury trials are not available as means of dispute settlement under RA legislation. But in order to have a complete understanding of what other ADR methods are available in other jurisdictions brief overviews will be presented for mini trials and summary jury trials.

"A mini trial is a private, consensual process where the attorneys for each party make a brief presentation of the case as if at a trial."[3] Usually during a mini trial a neutral advisor and high ranking officials from both sides, who have the authority to settle the case, are present and after the presentations the representatives attempt to settle the dispute. If they do not succeed, the advisor can start mediation or issue an advisory opinion regarding the likely outcome at the court.

Summary jury trial can be described in the following way: attorneys of each party make brief presentations of the case and a six member jury, who are appointed from a real pool of jurors, and to the presiding judge, after which an advisory verdict is made.[4]

Med-Arb is a process involving parts of mediation and arbitration. During med-arb the parties at dispute mediate and if they do not reach an agreement they go back to arbitrate their dispute. A key characteristic and often a drawback is that the mediator in this process is the same person who will later arbitrate the case, thus laying grounds for some procedural fairness violations to be claimed. This is because … the mediation process … is a collaborative process that involves divulging information to mediator as the trusted neutral. In contrast, arbitration is an adjudicative process that relies upon procedural fairness.[5] A mediator is told information which an arbitrator would not normally possess and accordingly the procedural fairness is impaired as the information obtained as a mediator could hinder making a decision based on the information received as an arbitrator and distinguishing between the information on the first place.

[2] https://www.legalmatch.com/law-library/article/types-of-alternative-dispute-resolution-adr.html
[3] https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mini-trial/
[4] https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/summary_jury_trial/
[5] https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/med-arb-maybe-not-better-idea/

Negotiation is a process which does not require a formal representation and a third party. During negotiation the parties sit around a table and try to resolve their dispute without any intervention by direct negotiations during which, by way of mutual concessions, an agreement can be reached.

Although med-arb and, in particular, negotiation are also available for dispute resolution under RA law and practice, this paper will examine in detail only arbitration and mediation as an ADR means with the emphasis on the enforcement issues.

Arbitration

Arbitration is like an informal trial. The two parties choose a 'third one' - the sole arbitrator or a panel of arbitrators, who decide the case. The arbitrators hear the positions of the two parties and issue a decision - the arbitral award, which is binding on the parties at dispute. Without much regulated formal rules and procedures as compared with trials in national courts, arbitration proceedings are shorter and less expensive as in the long term perspective they offer a faster resolution to the dispute saving the parties money that could be spent during the lengthy trials and procedures of appeals to higher courts.

To describe the notion of arbitration in brief; it is a dispute resolution method based on the agreement of the disputing parties. Therefore, in order to have arbitration as a dispute settlement means there should be an arbitration agreement or an arbitration reservation in the contract under or in connection with which the dispute has arisen. The process of arbitration starts when an arbitrator is appointed and ends when the arbitrator makes the award, which settles the case. In certain cases the arbitration agreement as well as the process of arbitration may continue after the award is made – in cases when the award is challenged and the dispute still remains. This will be discussed in Chapter 1 in more detail.

An arbitral award cannot be appealed on merits. The only option of challenge available for the losing party under the Arbitration act and the New York Convention is to apply to court for setting the award aside. However, the RA legislation does not provide for any regulations as to what happens after an award has been set aside. Is the arbitration agreement inoperative now leaving the parties with a dispute and without any resolution having spent so many resources or

the parties can start a new arbitration process? In the latter option we can find some other points of concern: if there is an option to start the arbitration anew, should it be conducted by the same arbitrators or a new tribunal?

Mediation

The next most used type of ADR available under RA legislation is mediation. Mediation is a method for reaching a settlement of the dispute by concluding a settlement agreement in a less formal proceeding without any strict procedural requirements. Parties, by mutual consent, choose a mediator who will discuss the dispute with both of them, suggest solutions and at the last stage, if a settlement option acceptable for both parties is reached, prepare or assist the parties in preparing a settlement agreement which is then signed by both parties and, in common practice or as a legal requirement, also by the mediator. During mediation there are no formal procedures as compared to the court trials and arbitration: mediation is a problem-solving process at the end of which ideally a win-win solution is reached, it takes place in a less intense and not adversarial atmosphere where parties try to find common grounds for settlement of the existing dispute. During mediation the 3rd party does not decide the case but acts as a moderator by offering alternatives to the parties helping them reach a solution on their own.

Article 3(a) of the EU Mediation Directive (2008) defines mediation as: "... a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State."[6]

RA Law on Mediation (2018) defines mediation as a process during which the parties to the dispute try to resolve the dispute with the help of an unbiased 3rd party. As the voluntary nature is also a characteristic of arbitration as well as other types of ADR, mediation is a process of direct negotiations by assistance of an independent 3rd party where the 3rd party tries to assist the parties in reaching a mutually acceptable settlement of the dispute by simply communicating with the

[6] EU Mediation Directive. (2008). Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0052&from=EN

parties and helping to facilitating the exchange of mutually acceptable positions without formal procedural rules and regulations.

Statement of the Problem

This paper aims to discuss the problems parties to a dispute encounter when trying to enforce arbitral awards and settlement agreements reached as a result of mediation, as well as grounds for challenge of an arbitral award focusing on the regulations concerning the situation that is created after an award has been set aside.

Justification & significance

Unlike judgements of the courts, which do not require additional court assistance in enforcement, the arbitral awards and agreements reached as a result of mediation process cannot be directly enforced and should undergo enforcement procedure at court to ensure the practical value of the formers and whole process of arbitration and mediation in general. Further, if the award is not made in the country where it is sought to be enforced, it is considered a foreign award and should be recognized by the competent court of the country where enforcement is sought. Under RA legislation this procedure is not clearly defined without any room for variation and misinterpretation. When approaching the issue practically we encounter rules of law, which are vague or there is lack of specific regulations especially in case of award recognition and enforcement procedure and concerning further regulations after the award has been set aside. For these reasons this paper aims to discuss the gaps that the legislation has concerning these issues and make some suggestions for improvement.

In the end if after encountering many obstacles, it becomes impossible to enforce the final award, the practicability of the arbitral awards and practical value of arbitration and mediation as an alternative dispute resolution means comes under question. Having clear legal regulations by removing the existing ambiguities would contribute to the development of extrajudicial dispute settlement practice in Armenia.

CHAPTER 1

RA Law on Commercial Arbitration: regulations regarding enforcement and setting aside the award

RA Law on Commercial Arbitration (hereinafter referred to as the Arbitration Act) was adopted in 2006 and amended in 2015.

The Arbitration Act defines arbitration as any arbitration regardless of being implemented by a permanent arbitral institution or being implemented without such institution (ad-hoc).

One of the changes brought by the 2015 amendments of the Arbitration Act concern the scope of the law: previously the law concerned only commercial disputes and disputes arising from commercial relationships, however, the amendments introduced in Arbitration Act and certain other related laws broadened the scope of the law allowing arbitration of not only commercial disputes but also for non-commercial matters for which law envisages dispute resolution through means of arbitration[7]. Some other amendments in the law include addition of sections regarding provisional measures during the arbitration process, and the principles and ethical rules of arbitrators' activity, etc.

1.1. Recognition and enforcement regulations

Article 35 of the Arbitration Act concerns the recognition and enforcement of the arbitral awards. Point 1 of the Article states that the award made by the arbitral tribunal on the territory of RA or in a Member State of New York Convention shall be recognized as binding and in case a written motion is presented to the appropriate court, it should be enforced in accordance with this article and Article 36. Article 36 on its turn lists the grounds based on which the court can refuse enforcement of domestic awards or recognition and enforcement of foreign award. The enforcement of an award in case of domestic awards, or recognition and enforcement of an award,

[7] RA Law on Making Amendments to RA Law on Commercial Arbitration (2015)

in case of foreign awards can be refused based on the grounds for challenging (setting the award aside) and based on two additional grounds granting discretion to the court not to refuse to enforce the award if it is not yet binding for the parties or it has been set aside, or it has been suspended by the court of a state where in accordance with the legislation of which the award has been made.

Scope of the Law

When we look at the provisions of the New York Convention (Article V) we see the same grounds for refusal of enforcement of awards. The main difference for the scope of this research is that the Convention applies only to awards "made in the territory of a State other than the State where the recognition and enforcement are sought, and arising out of the differences between persons, whether physical or legal" (Article 1).

One difference, however, arises from the reservation made to the Convention by Armenia when ratifying it:

"1. The Republic of Armenia will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

2. The Republic of Armenia will apply the Convention only to differences arising out of legal relations, whether contractual or not, which are considered as commercial under the laws of the Republic of Armenia."[8]

Hence international awards sought to be recognized and enforced in Armenia should be of commercial nature as defined by the Arbitration Act limiting the scope of the types of awards the enforcement of which can be sought in Armenia. Under the Arbitration Act, arbitration as an alternative dispute resolution means can be applied to disputes arising out of commercial relationships. Point 4 of the Article 2 defines the word commercial, the definition of which has been somewhat broadened by the amendments to the law adopted in 2015. The New York Convention, however, does not limit the scope of application. Here a question arises: what effect will the above-mentioned reservation have if RA legislation allows other non-commercial disputes

[8] Contracting States to New York Arbitration Convention, Retrieved from: http://www.newyorkconvention.org/countries

to be settled by arbitration? It is difficult to provide a clear-cut answer but judging from the wording of the reservation RA "will apply the Convention *only* to differences arising out of legal relations, whether contractual or not, which are *considered as commercial* under the laws of the Republic of Armenia". Broadening the scope of the law by adding new non-commercial arbitrable disputes will not change the nature of disputes making the added types commercial. If a dispute is subject to arbitration (is arbitrable), that does not necessarily mean that it is of commercial nature. Hence a possible answer to the question would be that the reservation will still apply to commercial disputes only, which will limit the scope of the Convention.

The RA Law on Mandatory Execution of Judicial Acts (hereinafter referred to as the Compulsory Execution Act) also contains regulations which concern the types of disputes covered by the law. Article 2 of the Compulsory Execution Act states what types of judicial acts are subject to mandatory enforcement among them being the awards of arbitral tribunals (point 3), the decisions and awards of foreign courts and arbitral tribunals regarding civil and economic (քաղաքացիական և տնտեսական) matter provided for by the international treaties of the RA (point 4). In this case we have an uncertainty. The 4th point of the provision can be interpreted in two ways: either it aims to establish the possibility for enforcement of awards with a broader scope of dispute types including the word "civil" besides the economic (which to a much extent is synonymous with commercial), or it states that the awards should only be arising from both civil and economic disputes at the same time. In the Arbitration Act we have disputes only of commercial nature and the scope of the word commercial is also provided. Hence we have a contradiction between the two laws as to what types of disputes are subject to arbitration and enforcement. This is yet another ambiguity that the law has in concern to arbitration regulations. It is important to have the same wording when referring to the same matters. So I would suggest making amendments to the Compulsory Execution Act and use the terms provided in the Arbitration Act to ensure uniformity of application of the laws.

Civil Procedure Code Regulations and the Interpipe Ukraine Case

RA Civil Procedure Code (1998, amended in 2018) defines the procedures for applying for enforcement of an arbitral award. Here we see different conditions and enforcement procedures

depending on whether enforcement is sought for a domestic or a foreign award. In case of domestic awards (Article 321) the application to the court will be examined if the seat of arbitration has been Armenia. Going into the formal regulations we can state that the application should be presented by the party, in favor of whom the award was made, the time limit for applying for the enforcement of the award is one year upon the date of receiving the arbitral award. The application for the recognition and enforcement of foreign arbitral award (Article 326) shall be presented by a party to foreign arbitration. The article also stipulates that the time limit for applying for enforcement of the award is three years starting from the date the award has entered into force. However, the law does not specify what can be understood by *entered into force*: is it the time when the award was signed, when notary has verified the award (in case of ad-hoc arbitration, and if required by the legislation of the seat of arbitration), after the period of making amendments to the award has lapsed, or after the challenge period has elapsed? Another point is the location: is the time calculated from entering into force in the seat of arbitration or the state where the enforcement is sought?

We see a difference in procedures between domestic and foreign awards in terms of time scope for applying for enforcement and the part of recognition. Foreign arbitral awards should be recognized by the court in order for it to be enforced. The Cassation Court of RA has provided the reasoning behind this policy.

The only applicable court case in regard to the recognition and enforcement of an arbitral award in RA is the case between the Interpipe Ukraine LLC and Golden Field LLC[9] in trying to recognize and enforce an arbitral award made by the International Commercial Arbitration Court existing alongside the Ukrainian Chamber of Commerce and Industry. The Court of General Jurisdiction of Kentron and Nork Marash administrative districts recognized the award and issued a writ of enforcement. The RA Service of Compulsory Execution of Judicial Acts did not perform the enforcement arguing that the time period for applying for enforcement has lapsed.

The applicant appealed. The Appellate Court of RA considered the claim of the applicant stating that the one year period should be calculated from the moment a final judicial act enters into force regarding the recognition of the award. The Appellate court upheld the decision of the Kentron and Nork Marash court.

[9] https://www.arlis.am/DocumentView.aspx?DocID=97905

The applicant brought a further claim to the Cassation Court of RA. The Cassation Court held that the calculation of the one year time scope for applying to compulsory execution of the performance act issued for a foreign arbitral award should be calculated from the moment the judicial decision recognizing the award enters into force. The Cassation Court further indicated that the recognition of foreign arbitral award ascribes to the award the same characteristics it would have if it were a national award, hence the award gains the feature of enforceability after it is recognized and considered equal to an award made by national arbitral tribunal or arbitration institution. Based on the application to the Constitutional Court of RA, the Constitutional court further held that the decision of the Cassation court on this matter is compliant with the Constitution.

In the light of the amended provisions of the Civil Procedure Code (2018) this judgement loses its practical value as the current regulation sets a longer time limit - three years - for recognition and enforcement of foreign arbitral awards. However, I would like to highlight the importance of the decision rendered by the Cassation Court in interpreting the law and providing a precedent for further similar cases.

Vahe Hovhannisyan, PhD, discusses the RA Law on Commercial Arbitration in his study guide "*Commercial Arbitration in the Republic of Armenia*" (2011). In Chapter 8 of the Study Guide Hovhannisyan discusses the problems that one is encountered with when trying to enforce an arbitral award, among them being date limits, amount of state dues, certification of the award, translation, agreement form, stare decisis, etc. Hovhannisyan suggests that recognition of arbitral awards and enforcement is a combination of legal relations with a collective aim and logically interconnected that represents a separate stage of judicial proceedings, a process by which the foreign arbitral awards gain the legal characteristics of a national award, which in its turn facilitates the process of enforcement of the award. Assessing Hovhannisyan's opinion as well as the Cassation Court judgement, I would like to underline that in the light of the legal requirements and formal procedures one encounters when trying to enforce a foreign arbitral award the characterizations offered by Cassation Court and Hovhannisyan foster and facilitate the ADR practice creating a ground for its development.

1.2. Setting Aside the Award

Grounds for Refusal of Enforcement and the *Right* of the Court to Refuse

In general, under RA legislation and international treaties no appeal procedures on merits are possible for an arbitral award by a superior institution. The award can only be set aside by filing an application to the court for setting the award aside which will be possible only on limited number of grounds (Article 34 of RA Law on Commercial Arbitration). The party applying for setting the award aside shall present evidence in support of a claim that (a) either the other party was lacking legal capacity (ֆիզդրծունեակ) or the arbitration agreement was invalid under the applicable law, (b) the party has not been duly notified about the appointment of arbitrator or the arbitration, or was deprived of the opportunity to present his/her due to some other reason, (c) an award has been made regarding a dispute not within the scope of the arbitration agreement, (d) the composition of arbitrators or the procedure of the proceedings did not correspond to the arbitral agreement between the parties. The above listed grounds may be brought as challenges for an award only by the losing party and cannot be raised by the court on its own initiative.

The court has the right by its own initiative to set the award aside if (a) the dispute is not an arbitrable matter under RA legislation; (b) the award is contrary to RA public policy. The latter is the ground that gives most discretion to the court as there is no clear definition as of what public policy means.

Another issue that Hovhannisyan mentions in his research is the *right* of the court to refuse enforcement if there are the grounds stipulated by the law. Hence, we may conclude that in one case the court can refuse enforcement, in another case with similar factual circumstances the court may uphold the claim for enforcement. As the court has a right to refuse recognition it can either make use of its right or not. It is obligated to use it every time a similar circumstance exists in a case, thus, providing a discretionary power to the court. This contradicts the legal doctrine of *stare decisis*[10], which literally means to stand by that which is decided. The notion behind *stare decisis*

[10] https://www.investopedia.com/terms/s/stare_decisis.asp

is that when making judgements the court should follow already decided cases with similar or same circumstances. The right of the court to refuse enforcement hinders the uniform application of the law as by giving discretionary power to the court it enables the court to make different decisions in cases with same or similar circumstances. This is another issue that should be addressed to ensure uniformity in applying the law.

Public Policy

Coming back to the grounds for refusal of enforcement I would like to mention that of all the grounds listed public policy is the only ground that gives most discretion of interpretation to the court because of not having a clear definition of the term *public policy,* and because the term can be interpreted differently in different jurisdictions. An example of such different interpretations is discussed below.

Zheng Sophia Tang discusses recognition and enforcement of awards in her book "*Jurisdiction and Arbitration Agreements in International Commercial Law*" (2014)[11]. In her research Dr. Tang suggests that recognition and enforcement regulations are relatively certain in a region with proper judicial cooperation. By discussing the examples of the US, the UK and China Dr. Tang draws parallels between these jurisdictions highlighting the differences in the existing practices of recognition and enforcement of arbitral awards, in particular the recourse to public policy as a ground to refuse recognition and enforcement.

In countries like the US and the UK the public policy ground is used somewhat restrictively in order to prevent the public policy rule from being used too lightly as Tang puts it. This includes using a narrow definition in regard to public policy by interpreting it only as 'international public policy' and by putting a procedural restriction not allowing a court to reopen a case on substantive grounds that have already been considered in arbitration. China, on the contrary, is more protective in this sense vastly using the public policy ground to refuse recognition and enforcement with a wider interpretation that can be given to the word. Tang provided that public policy defense is rephrased as 'public interest' in China and it may include

[11] Tang, Zh. S. (2014). Routledge. Jurisdiction and Arbitration Agreements in International Commercial Law

"not only the adopted rules, expressed state commitments and social morality, but also less transparent state interests and unstable short-term policies".[12] In addition, when it comes to enforcement treaties China requires reciprocity from other member states: "Foreign judgements [arbitral awards] can only be recognized and enforced in China if the judgement-rendering country and China have entered into bilateral/multilateral treaties, or if the reciprocal relationship exists".[13]

Similar to the case of enforcement issues, we have lack of judicial decisions regarding public policy grounds for refusing enforcement. In their research "*The Public Policy Exception to Recognition and Enforcement of Arbitral Awards under Armenian Law*" (2012) Koryun Tamrazyan and Stepan Khzrtian offer a brief analysis of RA public policy regulations based on legal practice of the US, RF and European countries as well as considering *Travaux Préparatoires* for the New York Convention.[14] By trying to identify the underlying policy for public policy exception, Tamrazyan and Khzrtian mention (1) sovereignty and a jurisdiction's right and duty to regulate its own territory and citizens which and (2) anti forum shopping/equality before the law.[15] Mostly the public policy exception is applied to prevent violation of state sovereignty not to allow an arbitral award directly conflicting with the laws of a state to be enforced because of the impossibility to review the case on merits. In this way, we may infer that public policy exception can be used to indirectly comment on the merits of the case. In other words taking into account that there is no possibility to review the case on merits, public policy exception can be used to refuse enforcement of the awards which in some way contradict the legal regulations of a state where the enforcement is sought.

The authors further suggest that "RA Civil Code definition of public order is to be read as a conflict of laws provision, calling for the application of Armenian law to disputes adjudicated in Armenia when foreign norms directly conflict with fundamental basis of Armenian law, rather than as a provision defining public order for the purpose of setting aside an otherwise properly adjudicated arbitral award".[16] Hence, despite the limitation of reviewing the case on merits the court rightly has the opportunity to protect state sovereignty and prevent the recognition and enforcement of arbitral awards that expressly conflict with domestic legal regulations. I do believe

[12] ibid 11, pg. 228
[13] ibid 11, pg. 233
[14] https://law.aua.am/files/2012/02/Legal-Memo-Public-Order.pdf
[15] Ibid 14, pg. 4
[16] Ibid 14, pg. 6

that there should be some limitation to this provision as is the case of the UK and the US brought by Tang to avoid misuse of the provision. Although we bear the risk of misuse of this tool, not having it may entail serious consequences in terms of uniformity of the law.

In their research "*Establishment of lawfulness and justice through arbitration with the example of Financial Arbitration Institution of Union of Banks of Armenia*" (2014) Karine Poghosyan, Heghine Badalyan and Mariam Mkrtichyan under supervision of expert Aida Avanessian discuss several issues related to the enforcement of arbitral awards by examining RA legislation and foreign experience among other things[17]. Based on the examination of foreign experience of arbitration the authors suggest that in countries where arbitration is more established as an alternative dispute resolution means generally there are no time limits for enforcing an arbitral award or even when there are time limitations, they do not restrict the right of a winning party to enforce the award made in his favor considering the reasonable length of the time scopes. [18]

The authors further discuss the RA legislation and in particular article 23 of the Compulsory Execution Act, which stipulates time scope for enforcing the awards: "The writ of enforcement can be presented for execution within one years starting from the day:

1. a judicial act has lawfully entered into force,
2. the arbitral tribunal made an award...".

The authors suggest making amendments to the mentioned provision of the law or to ensure broad interpretation of the law by the judges in order to avoid the situations when because of proceedings to challenge the award and delays in judicial proceedings the one year time period passes.

Under article 19 of the Compulsory Execution Act the writ of enforcement is issued by the decision of the court, which in its turn under article 13 of the RA Civil Procedure Code[19] is considered a judicial act. Hence the enforcement procedure can be initiated in accordance with the

[17] Karine Poghosyan, et.al. "Establishment of lawfulness and justice through arbitration with the example of Financial Arbitration Institution of Union of Banks of Armenia" (2014). Open Societies foundation
[18] ibid 17, pg 42
[19] After 2018 changes of the Civil Procedure Code the respective article is Article 5

point two of the Article 23 of the Compulsory Execution Act as well, in this way giving the winning party a longer time scope for enforcement.[20] As already discussed above, this argument is a good solution to the ambiguity of the law, however, in the light of the recent amendments of the Civil Procedure Code this point does not retain its practical value as under the current regulation the time limit for applying for recognition and enforcement of foreign arbitral awards is 3 years.

The Next Step After the Award is Set Aside

An important question arises concerning the situation we face after the award has been set aside: what happens next? The result of setting the award aside is that the dispute still remains and the parties need to resolve it. RA legislation is not specific on this matter. Poghosyan, et. al. provide in their research analysis concerning Article 34 point 4 of the Arbitration Act, which states that the court presented with an application to set an award aside can, by its own initiative or by the request of one of the parties, suspend the examination of the case in order to allow the arbitral tribunal to restart the arbitration procedure or take measure that in the opinion of the tribunal can remove the grounds for setting the award aside. However, this specific regulation concerns the process when the award is challenged but has not yet been set aside. The law remains silent on what happens after the award has been set aside. The authors of the research bring the example of Switzerland and Germany. In both countries after setting the award aside the court returns the dispute to the arbitral tribunal to make a new award, in German legislation specifically there is a regulation stating that the arbitration agreement is again operative for the purpose of settlement of the dispute.

Article 32 of the Arbitration Act states that the power of the arbitration tribunal ceases when the arbitration ends bearing in mind the provisions of articles 33 and 34 point 4. Article 33 of the Arbitration Act sets the opportunity for one the parties with the consent of the other party of making corrections to the award, or asking for explanations for specific points of the award within 30-day time period if no other date has been stipulated by the parties. Further, the Article states that one of the parties with the consent of the other party may ask the tribunal to make an additional award regarding the claims presented during the arbitral proceedings but reflected in the award. Point 4 of the article 34 states that the court presented with a claim to set an award aside

[20] ibid 17, pg 45

can by its own initiative or by the request of one of the parties suspend the examination of the case by a certain time period in order to allow the arbitral tribunal to re-examine the case or take other measures it would consider necessary for eliminating the ground for challenging the award. Hence it is implied that the powers of arbitration tribunal in these cases is considered continued[21].

However, considering the arbitration agreement operative again after the arbitral award has been set aside may be subject to different interpretation and later eventually prove to be another ground for setting the award aside again. As we do not have any regulations in this regards we cannot imply a specific course of actions because an opposite interpretation can also be implied. Similar to Swiss and German examples we should have clear regulations as to what logical steps should be there after the award has been set aside and the parties remain with an unresolved dispute. In addition, it should be mentioned that if the award has been set aside based on the invalidity of the arbitration agreement the further re-examination of the dispute would not be possible.

[21] ibid 17, pg 49

CHAPTER 2

RA Law on Mediation: regulations regarding enforcement

RA Legislation

RA Law on Mediation (hereinafter referred to as the Mediation Act) was adopted in 2018. However, the concept of accreditation of mediators and court directed mediation was first introduced in 2015. More specifically by the decision of RA Government N 720-Ն [22] in detail regulations were provided concerning the procedure of establishment of the mediation committee and its activities, as well as the procedures of organizing mediation trainings and the procedure of providing accreditation certificates, and the time scopes for the mentioned activities. In addition, amendments were made to RA Judicial Code regarding the legal status of mediators, the principles and rules of behavior for mediators, the rights and obligations of mediators, the accreditation of mediators, etc. Hence, we may infer that in 2018 the Mediation Act was adopted following introduction of mediation by amending certain existing laws in 2015 as a result of which the practice of mediation has already been practically introduced.

The Mediation Act provides procedures for mediation, the principles of mediation, as well as regulations regarding the Mediators Self-regulated Organization among others. If the parties succeed at the end of mediation process and agreement is reached which settles the dispute between the parties, the "settlement agreement", which is signed by the parties and the mediator by way of recognition. Article 11 provides the cases when the mediation is considered over, point 1 states that mediation process is considered over when an agreement is signed between the parties settling the dispute. RA Civil Code refers to mediation in Article 339 stating that the time limit for presenting a lawsuit to a court is suspended if the parties are engaged in mediation.

An interesting question worth of discussion is the case when a settlement agreement is signed by not an accredited mediator.

[22] http://www.irtek.am/views/act.aspx?tid=81164&sc=p16

Article 11 as already mentioned, states when mediation is considered to be over, point 1 more specifically states that the mediation ends when a settlement agreement is signed between the parties (1) կողմերի միջև կնքվում է վեճը հաշտությամբ լուծելու վերաբերյալ համաձայնություն՝ այդ համաձայնությունն ստորագրվելու օրվանից.). The wording of the law does not specifically mention that the settlement agreement should be signed by the mediator, it says the settlement agreement is signed between the parties. Point 1 of Article 3 of the Mediation Act states that mediator is an independent, unbiased physical person disinterested in the outcome of the case, who implements mediation with the aim of settling the dispute between the parties (1) Հաշտարարն անկախ, անկողմնակալ, գործի ելքով շահագրգռվածություն չունեցող ֆիզիկական անձ է, որն իրականացնում է հաշտարարություն կողմերի միջև առկա վեճը հաշտությամբ լուծելու նպատակով:). Point 4 of article 184 of RA Civil Procedure Code states that in case of signing a settlement agreement during a court-directed mediation the mediator within 2 day upon signing it should provide to a court the original version of the agreement (4. Դատարանի ներգրաված հաշտարարության արդյունքով հաշտության համաձայնություն կնքելու դեպքում արտոնագրված հաշտարարը պարտավոր է հաշտության համաձայնությունն ստորագրելու պահից երկու աշխատանքային օրվա ընթացքում այդ մասին ծանուցել դատարանին՝ կցելով հաշտության համաձայնության բնօրինակը:). From the wording of this article we may conclude that the agreement should be signed by the mediator as well. Although the above mentioned articles do not explicitly provide that the mediator should sign the settlement agreement, I do believe that the mediator, being the facilitator the mediation process and helping the parties to reach an agreement, should sign the settlement agreement as a formalization of the mediation process.

In regard to accreditation of the mediator the following articles will be discussed. As mentioned above, article 3 of the Mediation Act defines mediator as a free, unbiased, person not interested in the outcome of the case, who performs mediation with the aim of settling the dispute between the parties by mediation. Point 5 of the article 184 of the RA Civil Procedure Code states that the court appoints the accredited mediator chosen by the parties, and in case if the parties do not choose an accredited mediator the or mediation is appointed by initiation of the court, the mediator is appointed by the court as well (5. Դատարանը ներգրավում է կողմերի ընտրած արտոնագրված հաշտարարին, իսկ այն դեպքում, երբ կողմերը չեն ընտրում արտոնագրված հաշտարար, կամ հաշտարարություն ներգրավվում է դատարանի նախաձեռնությամբ, ապա հաշտարարին ներգրավում է

դատարանը:) From the wording of this article we may infer that mediators should have accreditation in order to be appointed by the court to conduct a mediation process.

Article 14 of the Mediation Act lists the steps a *mediator candidate* must take in order to become an *accredited mediator*. Those steps are taking accreditation training, passing an accreditation test and an interview. Then accreditation certificate is issued to the accredited mediator. Before receiving the accreditation certificate a person is a mediator candidate, not a mediator. Returning to our question when a settlement agreement is signed by not an accredited mediator, I would like to mention that a person lacking accreditation is not considered a mediator, and the issue of the accreditation of the mediator can arise only when the parties that have signed a settlement agreement disagree over some point mentioned in the agreement, which should not be the case as the agreement is signed based on mutual consent and agreement. If a similar situation occurs the settlement agreement loses its practical value as it means that the parties still have some disagreements and maybe some other forum is needed for solution of the existing dispute.

Points 9 and 10 of article 182 of the Civil Procedure Code lists the grounds based on which the case is discontinued (կարճվել) (9) because the court has verified a settlement agreement signed between the parties, and (10) the parties have signed a settlement agreement whereby they decided to discontinue the case pending at the court by the signature of the settlement agreement.

Article 236 of the Civil Procedure Code list the cases that are decided by a special proceeding at a court among them being the proceeding concerning the verification of the settlement agreement conducted by an accredited mediator via extrajudicial means (11) արտոնագրված հաշտարարի մասնակցությամբ արտադատական կարգով կնքված հաշտության համաձայնությունը հաստատելու վերաբերյալ գործերը). We can imply from this article that settlement agreement reached as a result of mediation procedure are subject to judicial verification and the court verifies the settlement agreement reached with the help of an accredited mediator. This statement is further confirmed by article 288 of the Civil Procedure Code, which states that if a settlement agreement is reached as result of mediation with an accredited mediator each party to the mediation has the right to apply to its court of general jurisdiction to have the settlement agreement verified by the court within 6 months after the agreement has been made.

So taking into account the above mentioned, we may infer that under settlements agreements made with the assistance of an accredited mediators are subject to judicial verification. If a settlement agreement has been made as a result of court-directed mediation procedure there is no need to file a separate application to a court for verification of the agreement. However, all the above mentioned articles either refer to mediation with an accredited mediator or just a mediator, which as we have already discussed also means an accredited mediator because before receiving accreditation a person is a mediator candidate not a mediator without accreditation. So the possibility of having a settlement agreement with a not accredited mediator is not provided for under the discussed legal acts. My conclusion on the matter would be that if a settlement agreement is made while having a not accredited person as a mediator, the court may verify the agreement under some reservations.

International Regulations

One of the internationally available instruments for mediation is the 2008 EU Mediation Directive.

As mentioned above, the aim of the Directive is to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by *encouraging the use of mediation* and by *ensuring a balanced relationship between mediation and judicial proceedings*." Article 6 of the Directive about the enforceability of the agreements resulting from mediation, state that it is possible for the parties or for one of them with the explicit consent of the others to request enforcement of the written agreement [settlement agreement]. The content of such an agreement can be made enforceable unless, it is contrary to the law of the member state or the law of the member state does not provide for the enforceability. The Directive also states that the enforcement can be made by a decision or a judgement of a court or competent authority of a state where the request is made. The Directive is applicable for disputes where at least on of the parties is domiciled in member state. However, the enforcement is possible only in a member state of the EU.

Another international instrument regarding the enforcement of mediation agreements is discussed by Jan O'Neil in her article *The new Singapore Convention: will it be the New York Convention for mediation?*[23]. In the Article O'Neil discusses the newly approved UN Convention on International Settlement Agreements Resulting from Mediation (hereinafter referred to as the Singapore Convention)[24] comparing it to the New York Convention. The Convention is expected to be open for signature from August 1, 2019. Article 1 defines the scope of the Convention, which is limited to commercial disputes only, it specifically states that is not connected to disputes arising from transactions made for personal, family or household purposes among others, as well as it excludes the arbitral awards from its scope of application, which distinguishes it from the other available documents regulating dispute settlement. Article 4 of the draft convention lists the requirements for reliance on settlement agreements, which are the settlement agreement signed by the parties, or which include evidence that the settlement agreement resulted from mediation.

The EU Mediation Directive is somewhat limited in its application in regard to Armenia as it provides for enforcement only in EU member states. The Singapore Convention on its turn being yet in a development stage does not provide any concrete regulations in concern to Armenia (as any other state), it's further number of signatory states and recourse to its provisions will provide evidence about its practicability.

[23] O'Neil, Jan (2018). The new Singapore Convention: will it be the New York Convention for mediation?Thopmson Reuters, Dispute Resolution Blog. Retrieved from: http://disputeresolutionblog.practicallaw.com/the-new-singapore-convention-will-it-be-the-new-york-convention-for-mediation/

[24] http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf

CONCLUSION

ADR is a widely used tool offering an opportunity for parties at a dispute to have extrajudicial proceedings and settle their disputes in a faster proceedings, which will save them money and provide the option of choice several important aspects, such as choosing the arbitrator(s), procedural law, the seat of arbitration, etc. The types of ADR (discussed in more detail in the introductory part of the paper) provide several means of dispute settlement, and, based on which option is chosen, the parties will benefit from the peculiarities of that option. However, this is not to say ADR provides only benefits to the parties as compared to the conventional (judicial) dispute settlement means. Depending on the type of the dispute the parties may value more the opportunity of bringing appeals on merits of the case to higher judicial instances, and let us not forget the limitations regarding the scope of the disputes that are considered arbitrable or are otherwise subject to be decided by alternative dispute resolution means.

In settling a dispute via ADR it is important to consider how practical the enforcement of the final result of the settlement is. Being limited only to arbitration and mediation this paper has discussed enforceability of arbitral awards and settlement agreements resulting from mediation.

It is important to highlight that when trying to enforce an arbitral award or recognize and enforce a foreign arbitral award a party should pay due attention to the time limitations provided by the law, as well as to the grounds for refusal of the enforcement or recognition and enforcement of the case and the judicial practice in applying those grounds of the specific country where enforcement is sought. Due consideration should be paid to the ground of public policy as of all the grounds it is the one that is mostly subject to various interpretations.

When trying to recognize and enforce foreign award a party should consider the scope of the dispute as Armenia has a reservation under the New York Convention stating that only the awards concerning disputes arising from relations considered commercial under its domestic legislation will be recognized and enforced.

The regulations relating to court-initiated mediation are more specific and cause less grounds for different interpretations.

Some improvement I would like to suggest avoiding the ambiguities or lack of regulations are the following:

- In general, it is advisable to have more clear regulations in relation to enforcement of domestic arbitral awards and foreign arbitral awards;
- To make amendments to the Compulsory Execution Act regarding the scope of the disputes that are subject to arbitration (civil and economic) in order to make it more compliant with the Arbitration Act, which uses the term 'commercial' (which is also used in the reservation made to the New York Convention);
- Similar to the example of German legislation discussed above, to have clear regulations regarding the dispute settlement procedure after an award made in accordance with an arbitration agreement has been set aside by a competent court (not on the ground of the invalidity of the arbitration agreement, of course);
- Extra-judicial (not initiated by a court) mediation as a distinct dispute settlement procedure should be considered in more detail to have sufficient regulation regarding it;
- Clear regulations should be provided regarding the signature of the settlement agreement by the mediator as a means of providing to the settlement agreement some extent of verification (հաստատում).

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